

NO. 49363-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

CHRIS MARION MCNICHOLAS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-00975-3

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Sufficient evidence was presented at trial to support McNicholas's convictions.**
- II. **The trial court properly admitted evidence pursuant to ER 404(b).**
- III. **McNicholas received effective assistance of counsel.**

STATEMENT OF THE CASE

Chris McNicholas (hereafter 'McNicholas') was charged by information with Theft in the First Degree, Identity Theft in the First Degree, nine counts of Forgery, and Contracting Without a License. CP 282-88. The charges stemmed from allegations that McNicholas, a contractor and owner of Green Tech, a construction company, promised an elderly woman, Ms. Audine Hitt, that he would perform work on her house, cashed many checks made out to himself personally, and kept the money without ever performing the work. Each charge also alleged that the victim was particularly vulnerable and that the offense was a major economic offense. *Id.* Each forgery count was associated with a particular check written on Ms. Hitt's bank account made out to McNicholas. The information identified nine checks that were alleged to have been forged: check numbers 2222, 2223, 2224, 2225, 2431, 2434, 2437, 2438, and 2440. *Id.*

Prior to trial, the State filed a motion to join the charges in this matter with associated charges McNicholas also was facing in another matter involving separate victims. RP 66-78. Within the motion to join, the State also moved the court to admit evidence pursuant to ER 404(b). RP 73-77. The State later filed a supplemental brief addressing the admissibility of the prior act evidence pursuant to ER 404(b). RP 90-101. McNicholas filed a motion to exclude this evidence. CP 237-57. The trial court found the proposed evidence was more probative than prejudicial and allowed the evidence to be admitted pursuant to ER 404(b), with limiting instructions to the jury. RP 295-304.

The case went to trial before a jury in July 2016. Prior to trial, McNicholas entered a guilty plea to Contracting without a License. RP 461-70. The State called 15 witnesses, including a handwriting expert, to establish that Ms. Hitt was an elderly woman with memory problems and problems taking care of herself, and that in 2014 a number of suspicious checks were cashed on her account totaling over \$50,000 made out to McNicholas. No work was done on her house in exchange for this money and several witnesses testified the signatures on the checks that are subject to the forgery counts were not Ms. Hitt's signature. The State introduced evidence pursuant to ER 404(b) of other times McNicholas had obtained money in a suspicious and deceptive way from elderly women who lived

alone. McNicholas objected to the evidence being admitted pursuant to ER 404(b), and filed a motion to exclude the evidence. CP 237-57.

McNicholas presented his own handwriting expert and his own testimony in his defense.

The jury returned guilty verdicts on all 11 remaining charges. CP 534-65. The jury also found that the victim was particularly vulnerable and that this was a major economic offense. CP 536-66. The trial court imposed a standard range sentence on each count, but ran counts 1 and 2 consecutively for a total sentence of 106 months. CP 626-40. The defendant then filed this appeal.

At trial, the witnesses testified to the following facts:

Audine Hitt was raised in Wichita, Kansas. RP 709. Ms. Hitt went to Kanas University and then the University of Oregon. RP 709. She obtained a Master's degree in mathematics, worked for Boeing Industries and then was a grade school teacher for 25 years for Salmon Creek Elementary. RP 709-10. At the time of trial, Ms. Hitt was 90 years old. RP 710. Ms. Hitt had two children, a son named Jan and a daughter named Kim. RP 706-09. The children were raised in Vancouver, Washington in a home located at 3809 NW 106th Street, where Ms. Hitt still resided at the age of 90. RP 710-11. Ms. Hitt's deceased husband built the home in approximately 1955. RP 711. At the time, the land surrounding the home

was mostly farmland. RP 711. By the time of the trial a subdivision had been built on the land. RP 711. Kim identified 24 photos showing her mother's neighborhood and house. RP 714– 30.

Ms. Hitt's carport was rebuilt in 2011 by a company named Ecobest. RP 739. Ms. Hitt's daughter, Kim, visited her mother while the construction was being done and observed a construction crew and materials and cars parked at the house. RP 741. Ms. Hitt's deck was also redone at the same time by Ecobest. RP 742-43. Kim was familiar with the carport before construction in 2011 and after. RP 744. At the time of trial in 2016, the carport looked the same as it did when Ecobest finished construction on it in 2011. RP 744. Kim was also familiar with the deck before it was rebuilt in 2011 and after. RP 745-46. At the time of trial in 2016, the deck looked the same as it did when Ecobest finished construction on it in 2011. RP 745-46. Kim was also aware that Ecobest put a new roof on her mother's house in 2011. RP 747. Kim was present at the house for a short period of time while construction was on-going. RP 747. Kim was familiar with the roof before construction in 2011 and after. RP 748. At the time of trial in 2016, the roof looked the same as it did after Ecobest put it on in 2011. RP 749. Kim was also familiar with the windows in her mother's house and testified that the windows in the house

at the time of trial were the same ones that had been in the house since Kim was a child. RP 751.

Towards the end of 2013 Kim noticed some changes in her mother. RP 797. Kim noticed her mother stopped doing the dishes every day and when Kim came to visit she saw dishes all over the house and the refrigerator was close to empty. RP 798. This was unusual for Ms. Hitt. RP 798. Ms. Hitt also had become forgetful in some ways. RP 798-99. Ms. Hitt wrote Kim a check once a month for \$500 and also reimbursed her via check for her airfare anytime Kim came to visit. RP 798-99. Every visit in 2014, Ms. Hitt repeatedly asked Kim about writing her a check and asked her six to ten times a day, “have I written you that check yet?” RP 799.

In 2014, Ms. Hitt lived alone. RP 754. That year, Kim visited her mom in early January, in March, in April, June, and July, and then again in October. RP 755-56. Kim did not see any evidence of construction being done on her mother’s house during her visits in 2014. RP 756. Kim did not see any crew working on the house, she did not see any building materials or cars either. RP 756-58.

In 2014, Ms. Hitt lived alone, was in charge of her own finances, and still drove herself. RP 760. Sometime between 2011 and 2014 Kim and her mother went to a lawyer to arrange for a power of attorney and trusteeship as a way of planning for the future in case her mother

developed dementia like Ms. Hitt's father had. RP 761. They executed a durable power of attorney in August 2011. RP 771-74.

Kim testified that her mother did not frivolously spend money and lived on a fixed income from her social security and a few annuities and her teacher's pension income. RP 774-77. The construction projects completed in 2011 were the first remodeling projects done to Ms. Hitt's house. RP 777. Kim testified her mother banked at Riverview Community Bank. RP 778. Kim was very familiar with her mother's signature and identified her mother's signature on the signature card from the bank admitted as exhibit 20. RP 778.

In October 2014, Kim was called from the bank alerting her to concerns with her mother's bank account. RP 778-79. Kim became aware that many checks had been written on her mother's bank account to McNicholas. RP 780. Kim reviewed the checks and testified that many of the signatures on the checks did not appear to be her mother's signature. RP 780. Specifically Kim testified that the signatures on checks 222, 2223, 2224, 2225, 2431, 2434, 2435, 2436, 2437, 2438, and 2440 did not at all look like her mother's signature. RP 781-82, 784-86.

Kim was not familiar with McNicholas; he was not a relative or family friend, and Kim had never seen him before. RP 786. Kim indicated that her mother routinely paid her bills by writing checks and mailing the

checks via the USPS. RP 787. Her mother wrote her checks at a desk located next to the door that led to the outside in the kitchen. RP 787. This door was the main entry for people coming and going in and out of Ms. Hitt's house. RP 788. Ms. Hitt kept her checks and mail and bills in a pile on top of this desk. RP 788. It was common for Ms. Hitt to keep several checkbooks out on her desk. RP 790. In the same area, Ms. Hitt kept a cabinet where she maintained receipts for all major purchases. RP 791. Kim estimated that for purchases over \$1,000 that would have been a "major" purchase for which her mother would keep a receipt in the cabinet. RP 791. After Kim was made aware of the issues with her mother's bank account, she looked for the checkbooks that would have contained the check numbers that were made out to McNicholas and she could not find any of those checkbooks, though she found others. RP 793. Kim also looked for any receipts or paperwork her mother would have kept documenting any purchases or contracts with McNicholas and she found none. RP 793-94. Kim found no contracts for home improvements for 2014. RP 794. Kim did, however, find a business card for a company called Green Tech. RP 795.

After Kim learned what was happening with McNicholas and her mother's bank account, Kim applied for and obtained a protection order to protect her mother from McNicholas in October 2014. RP 795. The

protection order had a copy of the power of attorney attached to it. RP 796.

Jennifer Melton worked as the assistant manager at Riverview Community Bank in Hazel Dell, Clark County Washington until September of 2015. RP 612. Ms. Melton knew the victim, Audine Hitt, through her job at Riverview Community Bank. RP 614. Ms. Hitt was a longtime customer at the bank and she came in quite often when Ms. Melton first started working at the bank. RP 614. Ms. Melton described how Ms. Hitt would come into the bank to deposit her social security checks and would fill out withdrawal slips without difficulty. RP 615-16. Then in the last couple of years, Ms. Hitt started missing items on the withdrawal slips and putting information on the wrong lines and tell the bank employees she did not know what to do with it. RP 616. These changes in Ms. Hitt's mental status were noticeable to Ms. Melton starting in about September 2013. RP 617. Ms. Melton believed Ms. Hitt was having problems with her memory and seemed more confused. RP 617.

Ms. Melton became aware of a number of checks posting to Ms. Hitt's account made out to the defendant, Chris McNicholas for large sums of money. RP 621-22. These checks were not in keeping with Ms. Hitt's usual spending habits. RP 622. The checks also were suspicious because of the signature on the checks. RP 622. Through her work, Ms.

Melton was familiar with Ms. Hitt's signature, as she saw it many times over the years. RP 623. Ms. Melton identified a signature card with Ms. Hitt's signature on it that was admitted as exhibit 20. RP 623-25. Ms. Melton identified the signature on exhibit 20 as Ms. Hitt's signature. RP 627. Ms. Melton identified many checks written on Ms. Hitt's account made out to Chris McNicholas: one on April 27, 2014 for \$673, another one on April 27, 2014 for \$1,000, one on April 28, 2015 for \$7,000, one on July 22, 2014 for \$762, one on August 29, 2014 for \$3,500, an additional check for \$4,200, one on June 25, 2014 for \$6,500, one on July 22, 2014 for \$1,400, one on August 11, 2014 for \$3,500, one on August 25, 2014 for \$760, one on April 27, 2014 for \$5,000, one on May 27, 2014 for \$2,000, one on June 2, 2014 for \$2,500, one on June 8, 2014 for \$5,000, one on July 20, 2014 for \$500, one on August 2, 2014 for \$2,500, one on September 8, 2014 for \$3,000, one on September 2, 2014 for \$500, and one on September 4, 2014 for \$2,200. RP 629-54. For the majority of the checks, Ms. Melton did not believe the signature on the checks belonged to Ms. Hitt and for each check she explained why the signature did not match what Ms. Melton knew to be Ms. Hitt's actual signature. *Id.* The State introduced many checks actually written by Ms. Hitt from her bank account and Ms. Melton identified and recognized the signature on those checks as belonging to Ms. Hitt. RP 656; Ex. 22.

When Ms. Melton became aware of all the checks written on Ms. Hitt's account to McNicholas that she believed were fraudulent, Ms. Melton froze Ms. Hitt's bank account, contacted Ms. Hitt and also contacted Ms. Hitt's daughter, Kim, and then contacted Adult Protective Services and law enforcement. RP 657-58. Ms. Melton put the freeze on Ms. Hitt's account on September 30, 2014. RP 660. On October 21, 2014, Ms. Melton received a phone call from McNicholas. RP 661-62. McNicholas was angry and aggressive on the phone with Ms. Melton. RP 662. Ms. Melton felt the phone call was threatening and it concerned her. RP 662. McNicholas asked Ms. Melton "what F-ing right" she had to return the checks as fraudulent. RP 663. Ms. Melton then ended the phone call. RP 663. McNicholas did not say anything about a contract during his phone call with Ms. Melton. RP 683.

Ms. Melton obtained video surveillance of when check numbers 2220 and 2221 were cashed on April 28, 2014 at the Salmon Creek Riverview Bank branch. RP 666-67. Ms. Melton obtained this video surveillance from Jean Butler, a woman who worked in the IT department at the bank. RP 667.

Andrew Szymanski is a forensic scientist in the questioned documents section of the Washington State Patrol Crime Laboratory in Spokane. RP 867. As a forensic scientist, Mr. Szymanski reviews

documents that contain handwriting, hand printing, signatures, inks, papers, printing processes, documents that are genuine in order to determine whether a document is genuine or not, whether a document has been altered, and to determine the source of a document. RP 868. Mr. Szymanski has been formally trained in questioned documents examination; he did a 2 year apprentice-type training with Dr. Philip Bouffard at the Lake County Crime Laboratory in Painesville, Ohio after obtaining his Bachelor's Degree in criminal justice. RP 868. Mr. Szymanski is certified by the American Board of Forensic Document Examiners. RP 870. Mr. Szymanski was qualified as an expert in the field of questioned document examination. RP 874. Mr. Szymanski reviewed 28 known checks from Ms. Hitt's bank account and thirteen questioned checks from her account. RP 892. Mr. Szymanski also reviewed three documents from August 22, 2011 – a trust agreement, a durable power of attorney and a healthcare power of attorney, all containing known signatures from Ms. Hitt. RP 894. Mr. Szymanski also received a document from Riverview bank containing a known signature from Ms. Hitt dated October 6, 2014. RP 895. Mr. Szymanski also reviewed several documents with McNicholas's writing on them. RP 895-96. After doing a side-by-side handwriting comparison between the questioned and known documents, Mr. Szymanski concluded that it was highly probable that Ms.

Hitt did not write the payee information or signature on check numbers 2222, 2223, 2224, 2225, 2431, 2434, 2437, 2438, and 2440. RP 897.

During his testimony, Mr. Szymanski used a power point presentation, admitted as Exhibit 96 to demonstrate to the jury how he came to his conclusion that 9 checks were not written by Ms. Hitt. RP 898-906. He observed that the way Ms. Hitt wrote the name 'Chris McNicholas' was different when compared to a questioned check. RP 899. The overall size of the payee name is smaller, there are differences with the letter formation of the M, the proportions of the letters, the cursive written dollar amount is different with regard to letter formations as well as skill level. RP 900. Mr. Szymanski also noted that on some of the checks for which he concluded Ms. Hitt was highly probably not the author, the signature was printed as opposed to being written in cursive. RP 900. For check numbers 2434, 2437, 2438, and 2440 Mr. Szymanski observed evidence that the writer of the signature was attempting to copy Ms. Hitt's signature. RP 904-06, 914-16.

Mr. Szymanski also analyzed McNicholas's handwriting, although he had only a limited number of samples of his handwriting. RP 911-12, 951-52. He found significant similarities between McNicholas's known handwriting and the writing on some of the checks that Mr. Szymanski determined Ms. Hitt did not write. RP 911-12. In analyzing the

endorsement signature on the back of the forged checks, Mr. Szymanski opined that McNicholas probably wrote the endorsement signatures on check numbers 2222, 2224, 2225, 2434, 2437, 2438 and 2440. RP 913 Mr. Szymanski could not reach a conclusion about whether or not McNicholas endorsed check number 2431. RP 914.

Jean Butler testified that she is the Assistant Vice President of information technology at Riverview Community Bank and has been for 14 years. RP 685. Ms. Butler testified that Riverview Bank has surveillance videos at each bank branch and part of her duties include ensuring the surveillance system is working properly. RP 686. Each camera has a date and time stamp on the video. RP 687. This enables Ms. Butler to pull up surveillance footage from a particular branch on a particular day and time and at a specific teller location. RP 688. In regards to McNicholas' case, Ms. Butler was asked to retrieve the video surveillance from April 28, 2014 from the Salmon Creek bank branch. RP 689. Ms. Butler retrieved this surveillance footage and captured still shots from the video. RP 690. Ms. Butler identified exhibits 53, 54, 55, and 56 as still shots from the surveillance footage from the Salmon Creek branch on April 28, 2014. RP 691.

The State submitted nearly two years' worth of bank statements for Ms. Hitt's account from December 2012 through October 2014. RP 990;

Ex. 21. These statements show that Ms. Hitt routinely had deposits from her retirement account, her social security, and her annuities totaling a little over \$7,200 per month. RP 992. For her statement from December 2012 to January 2013, Ms. Hitt had withdrawals in the amount of \$2,301.77. RP 993. From February 2013 to March 2013 Ms. Hitt's withdrawals totaled \$1,871.22. RP 994. For the period from April 2013 to May 2013, Ms. Hitt's withdrawals totaled \$3,235.52. RP 996-97. From July 2013 to August 2013 Ms. Hitt's withdrawals totaled \$1,748.35. RP 998. From December 2013 to January 2014 Ms. Hitt's withdrawals totaled \$1,298.57. RP 999-1000. From March 2014 to April 2014 Ms. Hitt's withdrawals totaled \$1,571.52. RP 1004. From April 2014 to May 2014 Ms. Hitt's withdrawals totaled \$20,232.22. RP 1004. From May 2014 to June 2014 Ms. Hitt's withdrawals totaled \$15,655.70. RP 1005. From June 2014 to July 2014 Ms. Hitt's withdrawals totaled \$12,862.59. RP 1006. From July 2014 to August 2014 Ms. Hitt's withdrawals totaled \$15,839.54. RP 1006. From August 2014 to September 2014 Ms. Hitt's withdrawals totaled \$12,103.68. RP 1007.

Andyi Veruca from Adult Protective Services met with Ms. Hitt on October 1, 2014. RP 1029. When Ms. Veruca first contacted Ms. Hitt, Ms. Hitt appeared confused and was not able to follow their conversation. RP 1035. Ms. Hitt was relatively mobile, she was able to walk up steps and

move around her home. RP 1037. Ms. Veruca asked Ms. Hitt if she had spoken to law enforcement, and Ms. Hitt told her she did not believe she had, but Ms. Veruca verified law enforcement had spoken to her the day before. RP 1038-39. Ms. Hitt had a hard time remembering who Ms. Veruca was and asked her multiple times during Ms. Veruca's visit who Ms. Veruca was. RP 1040. Ms. Hitt struggled with following the conversation during Ms. Veruca's visit. RP 1044. Ms. Veruca returned to visit Ms. Hitt the next day at Ms. Hitt's request. RP 1059-60. When Ms. Veruca arrived at Ms. Hitt's home the next day, Ms. Hitt did not remember who Ms. Veruca was or that she had arranged to meet with her. RP 1060. Ms. Hitt appeared a little more able to follow the conversation, but still presented as confused. RP 1060.

Margaretta Yaddof is an 80-year-old woman who lives by herself in a house in Clark County, Washington. RP 1143-44. On June 6, 2011 Ms. Yaddof met McNicholas when he stopped by her house trying to sell her a new roof. RP 1144. Ms. Yaddof ended up buying a roof from him with his company, Pacific Coast Vinyl. RP 1144-47. Ms. Yaddof entered into a contract with McNicholas to replace her roof, she paid him in full and he completed her roof replacement. RP 1149. Then, on November 6 or 7, 2014 McNicholas unexpectedly showed up at Ms. Yaddof's house and told Ms. Yaddof that he was "Chris McNicholas" and that she owed him

\$100 for inspecting her roof. RP 1150-53. Ms. Yaddof had been home and had not heard anybody up on her roof. RP 1153-54. McNicholas told Ms. Yaddof that he was required to check her roof. RP 1156. Ms. Yaddof testified that no part of their roofing contract provided for additional roof inspections. RP 1155. Ms. Yaddof refused to pay McNicholas any money and asked him to leave, but McNicholas did not leave. RP 1157-58, 1162. Ms. Yaddof's son, Randy Yaddof lived next door and Ms. Yaddof called him to come over to help her. RP 1158. Ms. Yaddof saw her son come over, speak to McNicholas, and then McNicholas left. RP 1159-60. The next night, McNicholas called her on the phone saying he still wanted his \$100. RP 1160.

Randy Yaddof testified that one evening his mother called him and told him a man was sitting in her driveway and wouldn't leave. RP 1173. Mr. Yaddof approached the man in the driveway and asked him if he could help him. RP 1174. The man told him he was there to do a roof inspection pursuant to the warranty. RP 1176. Mr. Yaddof told the man that he would look at the contract and if anything needed to be done they would contact him, but the man still did not leave. RP 1176. The man told Mr. Yaddof that he had to perform the roof inspection in order to keep the warranty valid. RP 1176. Mr. Yaddof told him that it was not a good time to do it and that the man could call him the next day to discuss it. RP

1176. The man then told Mr. Yaddof that he needed money because he did not have any gas and was wanting to do the job that evening. RP 1177. Mr. Yaddof explained to him that it was dark and he could not complete a roof inspection at that time, and he did not give the man any money. RP 1177. The man still sat in the driveway and then Ms. Yaddof stuck her head outside and asked if she should call the police. RP 1177. The man still protested that he did not have any gas and could not leave. RP 1178. The man looked through some paperwork, but said he could not find Ms. Yaddof's receipt. RP 1178. Mr. Yaddof told him he and his mother would look over Ms. Yaddof's copy of the receipt and that the man could call Mr. Yaddof the next day. RP 1179. Mr. Yaddof provided the man with a copy of his phone number. RP 1179. Mr. Yaddof told the man not to call his mother, but to call him instead. RP 1179. Mr. Yaddof identified the McNicholas in the courtroom as the man in the driveway that night. RP 1180.

Helen McGinnis is an 89-year-old woman who lives alone in Vancouver, Washington. RP 1340. In 2008 and 2009, Ms. McGinnis had work done on the windows in her home by Pacific Coast Vinyl. RP 1341-42. McNicholas had given Ms. McGinnis a business card which identified him as the President of Pacific Coast Vinyl. RP 1342. McNicholas and Ms. McGinnis entered into two separate contracts, one in 2008 for the

front windows, and one in 2009 for the back windows. RP 1343. The windows were guaranteed by a warranty. RP 1343. Ms. McGinnis paid for both contracts in full in 2008 and 2009. RP 1343. In 2014 Ms. McGinnis noticed steam between two window panes and contacted Pacific Coast Vinyl. RP 1344-45. No one answered at the company, but Ms. McGinnis received a phone call later from McNicholas asking if she had been trying to call. RP 1346. Ms. McGinnis asked McNicholas to come look at her windows, and he asked her if she lived alone, if she was a widow, and if her children helped her with her finances. RP 1346-47. Upon learning that Ms. McGinnis was a widow who lived alone and handled her own finances, McNicholas told her he would be right out to look at her windows and he immediately came to her residence that same evening. RP 1346-47. McNicholas told her she would have to pay \$300 to reinstate the insurance on her windows. RP 1348-49. Ms. McGinnis protested, telling McNicholas her windows were guaranteed and she shouldn't have to pay. RP 1349. McNicholas hassled Ms. McGinnis, telling her she had to pay \$300, then saying she had agreed to \$150 when she had said she would pay \$50, then telling her she really owed \$400, and kept at her until she wrote a check for \$150. RP 1350. McNicholas told Ms. McGinnis her window had a leak and he would come back and fix it. RP 1351-54. McNicholas never came back and never fixed her window. RP 1354-55.

McNicholas cashed the check and never refunded Ms. McGinnis her money. RP 1355-56. Ms. McGinnis wrote three letters to Pacific Coast Vinyl and all three were returned. RP 1455. She then wrote a fourth letter to McNicholas that was not returned to her. RP 1356. Ms. McGinnis had another contractor come out to look at her window. RP 1356. As it turned out, nothing was wrong with her window, there was simply moisture on the outside of the window. RP 1357.

Deputy Brady Spaulding of the Cowlitz County Sheriff's Office applied for a search warrant to search McNicholas' vehicle regarding this case. RP 1188. Deputy Spaulding was granted a search warrant and executed it on January 26, 2015. RP 1191. Deputy Spaulding found hundreds of documents inside McNicholas' vehicle. RP 1196. There was a handwritten letter from Helen McGinnis, and many manila colored folders with documents inside. RP 1198. There were folders associated with Betsy Miller, Helen McGinnis, Shinae Lane, and Audine Hitt. RP 1199-1203. Deputy Spaulding secured the folders, sealing each one in a separate envelope and transferred them to Detective Neiman. RP 1204-05.

Fred Neiman is a detective in the major crimes unit of the Clark County Sheriff's Office. RP 1438. Detective Neiman received evidence from Deputy Spaulding in Cowlitz County, namely several envelopes containing file folders with names on the tabs of the folders and

documents labeled as contracts inside the folders. RP 1453. One folder had the name Betsy Miller on it, and the folder and its contents were admitted as exhibit 106. RP 1458. The folder contained a contract between Pacific Coast and Vinyl and "M.M. Miller" from September 11, 2009. RP 1460. The signature on the contract read "Chris McNicholas." RP 1461. The folder also contained specification sheets, a receipt, a warrant receipt, a couple invoices, a notice from the Department of Labor and Industries, a handwritten letter, and a copy of the sales contract. RP 1463-65. Exhibit 107 was a folder relating to Helen McGinnis. RP 1466. The folder contained another folder containing a sales contract from Pacific Coast and Vinyl regarding buyer Helen McGinnis from September 16, 2008. RP 1469. There were also a couple receipts, an invoice, a sales order, a copy of a sales contract, a Department of Labor and Industries notice, a few drawing schematics, a warrant receipt and a receipt. RP 1470-71. Exhibit 108 was a file folder regarding Shinae Lane. RP 1473. This folder contained a sales contract between Pacific Coast and Vinyl and Katy Lane from October 19, 2009. RP 1474-75. The folder also had two other sales contracts, a Department of Labor and Industries notice, handwritten notes, a warrant receipt, a schematic, an invoice, a sales order, and a worksheet. RP 1480-81.

Detective Neiman also received a folder for Ms. Hitt containing a contract from Green Tech Innovations. RP 1482-83. The folder for Ms. Hitt also had a copy of a protection order protecting Ms. Hitt from McNicholas. RP 1483-84. The protection order was requested by Kim Hitt and was filed on October 21, 2014. RP 1483. The power of attorney document was attached to the protection order. RP 1484. There were no other documents found inside Ms. Hitt's folder. RP 1485. The sales contract found in Ms. Hitt's folder was purported to be between Green Tech Innovations and Ms. Hitt. RP 1489. The address line for the buyer's address was left blank on the contract. RP 1490. The contract was written in blue ink, but the signature appearing to be by Ms. Hitt was done in black ink, however the date line by Ms. Hitt's signature was filled out in blue ink. RP 1490. The space for the contract number was left blank. RP 1491. The sales contract was a carbon copy document with three total pages attached as one, the top white, the second canary and the third pink. RP 1490. All three pages were still attached inside the folder. RP 1491. The contract lists several services to be provided including section of the roof system, replacing and tightening screws and o-rings, flashings and vents on the roof; it lists rebuilding the carport, re-securing the roof system, installing new thermal paned vinyl windows. RP 1492. The contract lists the sales price at \$70,330. RP 1492. The contract lists a down

payment of \$35,000 and has a series of five checks and their amounts written down, corresponding with check numbers 2220, 2221, 2222, 2225, and 2223 from Ms. Hitt's account. RP 1493-94. The contract also has in handwriting: "I have asked if anyone helps you, Ms. Hitt, make any financial decisions because of your age, and if there was anything with a POA, and you replied no, there wasn't. All products come complete with lifetime warranty and will require at least half money upfront for materials." RP 1494.

Detective Neiman visited Ms. Hitt's home on July 8, 2016 and observed that the windows appeared to be aged, older windows that were in poor condition. RP 1444. The trim around the windows was wood that was cracked and showing signs of age. RP 1444. There were multiple layers of paint that was cracking and peeling off certain parts of the wood trim. RP 1444. Detective Neiman indicated it was clear nothing had recently been installed in those windows. RP 1445.

Glen Smyth had been a detective with the Clark County Sheriff's Office until 2015. RP 1292-93, 1297. At the time of trial he was an officer in Louisiana. *Id.* Officer Smyth met with Ms. Hitt on February 3, 2015 at her home. RP 1295. Officer Smyth observed that Ms. Hitt appeared to be very confused about what was going on, not even realizing that she had lost money. RP 1297. Officer Smyth looked at Ms. Hitt's roof and saw

that there was vegetation and things of the sort growing onto the roof and the gutters were full of debris and there were weeds growing in them as well. RP 1300. It did not appear that the roof had been touched for some time. RP 1300. Officer Smyth also looked at Ms. Hitt's windows and saw they were dirty, with a film on them leading Officer Smyth to believe they had not been cleaned in quite some time. RP 1304. The windows appeared to be older. RP 1305. Ms. Hitt's yard was overgrown, and no landscaping appeared to have been done. RP 1305.

Officer Smyth obtained a search warrant for McNicholas' bank records from Chase Bank and Bank of America. RP 1309. Officer Smyth found that check number 2222 for \$5,000, check number 2223 for \$2,000, check number 2224 for \$2,500, check number 2225 for \$5,000, check number 2379 for \$7,000, check number 2380 for \$762, check number 2386 for \$3,500, check number 2428 for \$4,200, check number 2429 for \$6,500, check number 2431 for \$500, check number 2433 for \$1,400, check number 2434 for \$2,500, check number 2435 for \$3,500, check number 2436 for \$760, check number 2437 for \$3,000, check number 2438 for \$500, and check number 2440 for \$2,200, all drawn on Ms. Hitt's account, were all deposited into McNicholas' bank account. RP 1313-23. In reviewing McNicholas' bank accounts, Officer Smyth saw no transactions involving the purchase of building materials. RP 1324-25.

Mike Puranen is the general manager of Ecobest Exteriors. RP 1520. Ecobest contracted with Ms. Hitt to do a couple of projects for her on her house in 2011. RP 1528. Prior to starting work, Mr. Puranen contacted Kim Hitt because of their concern that Ms. Hitt might have some memory problems and might need someone there to help her out. RP 1531-32. Ecobest rebuilt a carport that was falling in on itself and rebuilt the deck that was falling off the house. RP 1532. Ecobest completed these two projects in approximately two weeks and charged Ms. Hitt \$7,800 for both projects. RP 1535. Several months later Ecobest entered into a contract with Ms. Hitt to replace her roof. RP 1540. The total cost for the roof replacement was \$16,795. RP 1542. Mr. Puranen identified photographs of the carport, the back deck and the roof of Ms. Hitt's home taken immediately after finishing the project. RP 1543-44. These photographs were admitted as exhibits 63, 64, and 65. RP 1544. In April 2016 Mr. Puranen went to Ms. Hitt's home and saw the roof had not been changed from the roof he installed in 2011, and no changes had been done to the carport from when he rebuilt it in 2011. RP 1553-54.

In his defense, McNicholas presented a witness on handwriting analysis. RP 1624-1721. Jacqueline Joseph has a degree in secondary education from the University of Arizona with a subcategorization of drama and theater arts and public speaking. RP 1706. She was an

international flight attendant with American Airlines. RP 1706. She also studied botanical sciences in college and was a botanical scientist for many years where she evaluated skin conditions and used botanical remedies to correct the problems. RP 1706-07. Ms. Joseph took a one year correspondence course on questioned document examination in 1992. RP 1707-08. Ms. Joseph was not aware that the overseer of the correspondence course had commented that the course was “not intended as a course to qualify students as document examiners.” RP 1709.

Ms. Joseph was tasked with evaluating the written report of Mr Szymanski, the State’s handwriting expert, and not conducting her own questioned documents examination. RP 1703. Ms. Joseph’s original report on the handwriting involved on the fraudulent checks in this case was only 4 pages in length and did not set forth any work or description of how she came to her conclusions. RP 1676-77. The State’s handwriting expert had 115 pages of case notes associated with his work on this case. RP 1679. Ms. Joseph’s report did not include a questioned documents examination or any work product. RP 1680. Ms. Joseph testified that she did not have enough known samples from Ms. Hitt to do a competent examination as she did not know if Ms. Hitt ever printed her signature. RP 1695. Ms. Joseph agreed that if she were to see hundreds of pages of checks written by Ms. Hitt that showed she never printed her signature, that that

information would have been helpful for her to know in determining whether or not any of the questioned documents were signed by Ms. Hitt. RP 1697. Ms. Joseph offered her opinion that she could draw no conclusion as to who had or had not signed the nine checks associated with the forgery charges. RP 1644-72. Ms. Joseph also disagreed that four checks had indications that someone had tried to copy Ms. Hitt's signature. RP 1659-60.

McNicholas then testified in his defense. RP 1791-1960. He testified that he is a direct sales rep for Green Tech Innovations and Pacific Coast Vinyl. RP 1791-92. McNicholas did not have Green Tech licensed, bonded, and insured. RP 1794-95. McNicholas indicated it was standard operating procedure to enter into contracts with customers requiring them to pay a third to half up front, prior to work being done. RP 1804. McNicholas had experience with working with retired adults as customers and experienced their family members calling him up asking what he had been doing at their family member's house. RP 1805. He referred to these as "opposite party kills," and this experience was part of the reason for a down payment as it helped solidify the business. RP 1805. Prior to entering into a contract with Ms. Hitt, McNicholas had a negative experience with an elderly lady with whom he had contracted to replace her deck. RP 1807. The woman was 92 years old and per McNicholas

decided not to pay him for his services. RP 1808. McNicholas then found out that woman's house was in a trust and he was unable to file a lawsuit against her to get paid. RP 1808. The woman then got a restraining order against McNicholas. RP 1916-17. He lost \$37,000 to \$39,000 on that job. RP 1809.

McNicholas did enter into a contract with Ms. Hitt. RP 1818-22. He would have had to pull permits to work on the roof and deck. RP 1820. McNicholas identified the contract he entered into with Ms. Hitt to do \$70,330 worth of work to her house. RP 1826. McNicholas wrote down the check information for the checks he received from Ms. Hitt as he received them. RP 1827. McNicholas spoke with Ms. Hitt and confirmed with her that she was the only one who made her financial decisions and made all her own decisions regarding her home improvement contracts. RP 1835-37. Ms. Hitt paid McNicholas in installments, all by check. RP 1844. McNicholas received some of the checks from Ms. Hitt herself, and others from Brandon Reed, a contractor McNicholas used. RP 1844. McNicholas indicated the checks were written to him personally because he did not have a bank account for Green Tech. RP 1891.

McNicholas entered into the contract with Ms. Hitt in April 2014, and had not ordered any windows or performed any labor by October 2014. RP 1845. McNicholas indicated he had not started the job because

he did not have the full down payment, and also he had not yet decided which product he was going to use. RP 1846. McNicholas also testified he worried about Ms. Hitt and her ability to live alone so he did not want to start any work until he spoke with Ms. Hitt's daughter, which he never did. RP 1846.

McNicholas agreed he accepted \$42,533 in checks from Ms. Hitt between April 2014 and August 2014 and none of the money went towards doing any work on her house. RP 1945-1946. McNicholas indicated he received an additional \$5,700 in September 2014 from Ms. Hitt, but that "some" of that money went to work on her home. RP 1946.

ARGUMENT

I. Sufficient Evidence was presented at trial to support McNicholas's convictions.

McNicholas argues the State presented insufficient evidence to support his convictions for Theft in the First Degree, Identity Theft in the First Degree, and Forgery. The State presented sufficient evidence to support all of McNicholas' convictions. McNicholas' claim fails.

In reviewing a claim of insufficient evidence, this Court considers the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence. *State v. Pacheco*, 70

Wn.App. 27, 38-39, 851 P.2d 734 (1993), *rev'd on other grounds*, 125 Wn.2d 150, 882 P.2d 183 (1994). All reasonable inferences from the evidence must be drawn in favor of the State. *Salinas*, 119 Wn.2d at 201. This Court also defers to the jury's resolution of conflicting testimony, evaluation of the credibility of witnesses, and its view on the persuasiveness of the evidence. *State v. Lubers*, 81 Wn.App. 614, 619, 915 P.2d 1157 (1996). This Court should affirm the convictions if any rational trier of fact could have found the essential elements of the crime. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence is as probative and reliable as direct evidence, and the State may rely upon both in presenting its case. *State v. Kroll*, 87 Wn.2d 829, 842, 558 P.2d 173 (1976); *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880 (1991); *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977).

A person commits Theft in the First Degree if he or she commits theft of property or services which exceed \$5,000 in value. RCW

9A.56.030. "Theft" means

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services;

....

RCW 9A.56.020(1)(a)-(b). A person is guilty of Identity Theft in the First Degree if he knowingly obtains, possesses, uses or transfers a means of identification or financial information of another person, with the intent to commit any crime, and obtains money, goods, services, or anything else in excess of \$1,500 in value. RCW 9.35.020(1), (2). A person commits forgery when he falsely makes, completes, or alters a written instrument or possesses, utters, offers, disposes of, or puts off as true, a written instrument which he knows to be forged with the intent to injure or defraud. RCW 9A.60.020.

McNicholas argues the State failed to prove that “the defendant understood that he was committing illegal acts” and thus the State presented insufficient evidence of his guilt. Br. of Appellant, pp. 15-16. More specifically, McNicholas argues that the State failed to present evidence that the proved beyond a reasonable doubt that the victim did not write the nine checks the State alleged were forged and which formed the basis of McNicholas’ convictions for Theft in the First Degree, Identity Theft in the First Degree, and Forgery. McNicholas argues that the State’s handwriting expert was only able to testify that it was “highly probable” that the victim did not write or sign the checks, that it was “probable” that the defendant had endorsed eight of those checks, that there was evidence

that someone had tried to copy the victim's signature on four checks, and thus the State was unable to prove beyond a reasonable doubt that the victim did not write the checks and thus willingly give McNicholas the money. Br. of Appellant, p. 16-17.

Any rational trier of fact would have found McNicholas guilty of all the crimes charged. The evidence presented by the State was overwhelming. McNicholas misstates the impact of the evidence in his brief. Under a sufficiency of the evidence standard, all the evidence the State admitted is presumed true, with all reasonable inferences drawn in the State's favor. *See Salinas, supra*. McNicholas argues the only evidence the State submitted to support the convictions came from Mr. Szymanski, the State's handwriting expert, who concluded it was highly probable the victim did not sign the checks drawn on her account. However, the evidence was much more voluminous than that. When all the evidence is considered, as it must be, there is ample support for the convictions entered by the Superior Court below.

Through its 15 witnesses, the State showed that McNicholas tricked Ms. Hitt, that he forged her checks, he stole her money, and he used a construction contract as a cover story to explain why she would be giving him so much money. The evidence showed Ms. Hitt was an elderly woman who had significant memory problems, to the point where she

could not remember meeting with officers from one day to the next, she could not remember making appointments, and she could not remember writing checks and would easily agree to write them again. The undeniable evidence, admitted to by McNicholas during his testimony, is that he obtained over \$40,000 from Ms. Hitt under the guise of a construction contract and did not perform any work for her, and never returned the money. This incontrovertible evidence easily proves Theft in the First Degree whether McNicholas forged the checks or not.

The State's evidence showed that McNicholas is a salesman who got to know Ms. Hitt, found an easy target and took advantage of her and her significant memory issues. Over six months in 2014, McNicholas deposited many checks from Ms. Hitt's bank account, totaling over \$52,000. In those six months McNicholas did no work on Ms. Hitt's home. People who knew Ms. Hitt testified to her changing mental status in 2013 and 2014. Ms. Hitt's daughter, Kim, testified her mother's memory and ability to care for herself was declining during this time period. Ms. Melton, a bank employee who had seen Ms. Hitt weekly for years also testified that Ms. Hitt's mental status was deteriorating and she was forgetting how to do ordinary tasks. Ms. Veruca from Adult Protective Services testified about Ms. Hitt's clear memory issues during her meetings with her and her easy confusion and inability to do routine tasks,

like sign and date a form. The police officers who contacted Ms. Hitt about this case testified to a similar experience and observation of Ms. Hitt's mental state.

The State presented significant evidence that McNicholas performed no work on Ms. Hitt's home in exchange for the over \$52,000 he took from her. The contractor who installed the roof on Ms. Hitt's home testified that the roof was unchanged from when he installed it in 2011, that the deck was unchanged from when he built it in 2011, as was the carport. Many photographs were admitted into evidence which showed Ms. Hitt's roof was not new, her gutters had not been cleaned or fixed, and her windows were quite old and in disrepair.

The State also presented significant evidence that McNicholas never intended to perform work on Ms. Hitt's home. He was not a licensed, bonded or insured contractor. He took out no permits to perform any work on her house. The State had files from McNicholas' prior clients that contained documentation showing the work done on the homes, receipts for the materials bought, copies of contracts, invoices, warranties, disclaimers, drawings and schematics, etc. The file McNicholas had on Ms. Hitt had no such documentation, only a contract that State alleged was fabricated, and a copy of the protection order Kim Hitt obtained against McNicholas with a copy of her power of attorney attached to it.

The State also presented testimony from multiple witnesses that the signatures on the nine checks that are the subject of the forgery counts did not belong to Ms. Hitt. Ms. Hitt's daughter, Kim, has been familiar with her mother's handwriting her entire life, and knows her signature and testified the signatures on the checks did not appear to be her mother's. The bank employee, Ms. Melton, who had known Ms. Hitt for years and who was very familiar with Ms. Hitt's signature testified that the signatures on those checks did not appear to be from Ms. Hitt. And finally the State's handwriting expert, Mr. Szymanski testified that it was highly probable the checks were not written by Ms. Hitt.

Even without any other evidence, there is ample evidence, when all the facts are taken in the light most favorable to the state, to prove that McNicholas committed Theft in the First Degree, Identity Theft in the First Degree, and nine counts of Forgery. Yet the State submitted even more evidence. Pursuant to ER 404(b), the jury heard McNicholas had also obtained money from elderly women living alone by pressuring them and claiming they owed him for work they did not believe he had done and which they had not asked him to do.

The State showed, beyond all reasonable doubt, that McNicholas tricked Ms. Hitt, he used her vulnerabilities against her, and he stole over \$50,000 from her via trickery, promises he never fulfilled, fake

construction contracts, and forged checks, clearly not made out by Ms. Hitt, and clearly not received by McNicholas for any legitimate purpose. McNicholas conned Ms. Hitt and the rational and reasonable jury that was empaneled in this case all agreed he was guilty of these crimes. McNicholas's argument that the State failed to present sufficient evidence to support his convictions fails. His convictions should be affirmed.

II. The trial court properly admitted evidence pursuant to ER 404(b).

McNicholas argues the trial court erred in admitting evidence of other times he swindled elderly women pursuant to ER 404(b). The trial court properly admitted this evidence to prove McNicholas' intent and as a common scheme or plan. The trial court did not abuse its discretion in admitting this evidence and McNicholas' claim fails.

ER 404(b) governs the admissibility of other crimes or misconduct into evidence. This rule allows admission of other crimes, wrongs or acts as long as it is not admitted to show character of a person in order to prove action in conformity therewith. ER404(b). The rule itself lists some, but not all, permissible purposes for admission of the evidence. The rule states that such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. ER 404(b). In order to admit evidence of other acts

under ER 404(b), the trial court must 1) find by a preponderance of the evidence that the act occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995). A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *Id.* at 648. A trial court abuses its discretion if no reasonable person would take the view the trial court adopted, or if the court's decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). On review, an appellate court may consider proper bases for admission of evidence at trial, even if the trial court's purported reason for admitting the evidence differed. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); *State v. Cummings*, 44 Wn.App. 146, 152, 721 P.2d 545, *rev. denied*, 106 Wn.2d 1017 (1986).

Prior act evidence offered under ER 404(b) must be proved to the court by a preponderance of the evidence. *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993) (citing *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true

than not true.” *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). A trial court’s finding will be upheld if it is supported by substantial evidence. *Id.* (citing *Tharp*, 96 Wn.2d at 594). Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the asserted premise. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The trial court decides issues of fact and makes credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This Court will not disturb a trial court’s credibility determination on appeal. *Id.* Further, our Supreme Court has previously stated, “[w]e believe, in the final analysis, that the trial court is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred.” *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002).

McNicholas was charged with Theft in the First Degree. CP 282-88. The allegations were that McNicholas obtained nearly \$50,000 from the victim by stealing it from her and by convincing her to give him her money under the pretense that he was a contractor who would provide construction work for her on her house. The State had the burden of proving that McNicholas intended to unlawfully deprive the victim of her money. *See* RCW 9A.56.020. The State had evidence that McNicholas also deprived other elderly women of their money through a con involving

convincing them he was a licensed contractor and getting them to pay him for work he did not perform. These prior acts prove McNicholas' intent in this case because it shows McNicholas intended to take the money from the victim under the guise of being a contractor, never intending to complete the work to her house, and keeping the money.

The evidence was also properly admitted to prove a common scheme or plan. When "several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" or when "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes," such evidence may be admissible to prove the existence of a common scheme or plan. *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). To admit evidence of a plan used repeatedly, the prior misconduct must show "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which' the two are simply 'individual manifestations.'" *State v. Gresham*, 173 Wn.2d 405, 421-22, 269 P.3d 207 (2012) (quoting *Lough*, 125 Wn.2d at 860). Although, the common thread among the various instances of conduct do not need to be "a unique method of committing the crime." *State v. DeVincentis*, 150 Wn.2d 11, 19-21, 74 P.3d 119 (2003).

In *Gresham, supra* when the co-defendant (Schermer) was charged with first degree child rape and child molestation, the reviewing court found the trial court properly admitted evidence of Scherner's molestation of four different children, on four different occasions, as evidence of a common scheme or plan. *Gresham*, 173 Wn.2d at 423. The charges in Scherner's case stemmed from Scherner taking a trip with his wife and seven-year-old granddaughter. On one occasion, when Scherner was sleeping on a downstairs couch, Scherner's granddaughter went downstairs to get water. Scherner invited her to lie down next to him and then fondled her vagina with his hands. On another occasion, Scherner convinced his granddaughter to put her hand on his genitals, because it would help him sleep faster. *Id.* at 416. The other, un-charged, incidents included the following: (1) a different victim was a family friend of Scherner who stayed at his house on multiple occasions. When the victim was four or five years old, the defendant took her to his bedroom, fondled her vagina, and performed oral sex on her; (2) a second victim was Scherner's niece. When this victim was 13 years old, Scherner entered her room and performed oral sex on her; (3) a third victim, another family friend, was molested by Scherner when she was thirteen years old, while on a family trip; and (4) a fourth victim, another granddaughter, was molested by Scherner when she was six years old, while in a hotel room,

where Scherner performed oral sex on her. *Id.* The reviewing court agreed that there were differences in each of these other incidences (from each other and from the charged conduct); however, it found “these differences are not so great as to dissuade a reasonable mind from finding that the instances are naturally to be explained as ‘individual manifestations’ of the same plan.” *Id.* at 423.

Similarly, in the instant case, there were certainly some differences between each incident; however, these differences are not so great so as to dissuade a reasonable mind from finding that the incidences are naturally to be explained as individual manifestations of the same plan -- specifically, the defendant targets elderly victims and convinces them to give him money by representing himself as a licensed contractor who will perform work for them. Consequently, these other incidents were properly admitted to prove a common scheme or plan.

It is clear the trial court did not abuse its discretion in allowing admission of prior act evidence pursuant to ER 404(b). The trial court discussed the relevant legal principles and applied them to the facts of this case. The trial court indicated it understood its analysis to consist of four steps, those being:

...one, whether or not the court finds that by a preponderance of the evidence that the misconduct occurred, two identifying the purpose for which the

evidence is sought to be introduced, three, determining whether the evidence is relevant to prove an element of the crime charged, and four, then, to weigh the probative value against the prejudicial effect.

RP 295-96. Regarding the first step, the trial court found that the prior acts had occurred by a preponderance of the evidence. RP 297. The trial court identified the purposes for admission of the evidence as being to establish McNicholas' intent to deprive the victim of her money and also as a common scheme or plan. RP 297. The trial court found that the prior acts were similar to the current allegations in that they involved similar ages of the victims, an allegation that McNicholas required payments for services that were either unnecessary or not provided, construction projects, the interplay between his unlicensed business, Green Tech, and McNicholas' request for multiple payments from the individuals involved. RP 298-301. The trial court then specifically found this evidence was relevant to prove intent and due to the similarities in the prior acts and the current charges, they were relevant and admissible as a common scheme or plan. RP 301-02. And finally, the court discussed the potential prejudice and the probative value of the evidence on the record, weighed them against each other, and found that the probative value outweighed the potential prejudice. RP 303.

The trial court used its discretion in finding the prior acts evidence was admissible to prove intent and to prove common scheme or plan. The trial court relied upon the proper legal standard, clearly considered the evidence available, the facts of the case, and the impact the evidence would have on the case, and in an appropriate exercise of its discretion the trial court admitted the evidence. The trial court's decision was not manifestly unreasonable or based upon untenable grounds. McNicholas' claim the evidence was improperly admitted should be rejected.

III. McNicholas received effective assistance of counsel.

McNicholas alleges his trial counsel was ineffective for failing to propose an instruction to the jury and make an argument that he had a good faith claim of title to the money that was the basis of the Theft in the First Degree charge. McNicholas cannot show that his attorney was ineffective for failing to request this instruction as he cannot show it was not a reasonable trial strategy, nor can he prove prejudice. McNicholas' claim of ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In

Strickland, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*,

166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that

“but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly deferential to trial counsel’s decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel’s performance *Strickland*, 466 U.S. at 689-91.

McNicholas cannot show he was prejudiced by his attorney’s failure to request an instruction pursuant to WPIC 19.08 as such an instruction was not appropriate in this case and the trial court would not

have given it. Attorneys have no duty to make frivolous arguments or propose inappropriate instructions. When a theft is done by “a patently deceptive act, the defense [of good faith claim of title] of title is not available.” *State v. Pestrin*, 43 Wn.App. 705, 710, 719 P.2d 137 (1986) (citing *State v. Wellington*, 34 Wn.App. 607, 612, 663 P.2d 496 (1983)); see also *State v. Stanton*, 68 Wn.App. 855, 845 P.2d 1365 (1993); *State v. Casey*, 81 Wn.App. 524, 915 P.2d 587 (1996); *State v. Hull*, 83 Wn.App. 786, 924 P.2d 375 (1996). In *Pestrin*, the defendant participated in rolling back odometers on vehicles that he then sold. On review after his conviction for theft, the reviewing court found that Pestrin’s participation in rolling back the odometers was a “patently deceptive act” and therefore the defense and instruction on good faith claim of title was not available to him. *Id.*

In *Wellington, supra*, the defendant was convicted of theft by deception because she led an undercover officer to believe he could purchase sexual activity with her and then failed to perform consistent with that impression after the undercover officer had paid her. *Wellington*, 34 Wn.App. at 610-11. On review, the defendant claimed she had a complete defense under RCW 9A.56.020(2), that she had made a good faith claim of ownership. *Id.* at 612. The Court of Appeals found the

defendant's contention "patently frivolous." *Id.* The Court quoted *State v.*

Emerson, 43 Wn.2d 5, 259 P.2d 406 (1953) in its holding, stating:

A false representation of a material fact, made for the purpose of inducing another to part with his property and with the intent to deprive him of his property, is inconsistent with any open and avowed claim of title preferred in good faith; and the defense allowed by the statute is unavailable in a prosecution for obtaining money by false pretenses.

Emerson, 43 Wn.2d at 12.

As in *Pestrin*, *supra* and *Wellington*, *supra*, McNicholas engaged in patently deceptive acts to deprive the victim of nearly \$50,000. He had no good faith claim of ownership to her money and any argument he did is entirely frivolous. The trial court never would have given an instruction to the jury pursuant to WPIC 19.08 as this defense was unavailable to McNicholas given the facts that had been presented to the jury. McNicholas's claim of ineffective assistance of counsel fails.

The jury found McNicholas guilty of forgery. This clearly shows the jury found, beyond a reasonable doubt, that McNicholas forged the checks made out to him from the victim's bank account. McNicholas did not openly and avowedly claim title of the money in the victim's bank account. He had no right of ownership or entitlement to possess money that came into his possession via checks he forged off of another person's bank account. Even if McNicholas claimed a debt owed to him by the

victim, the good faith claim of ownership defense would not have been available to him as this defense is only available to a defendant recovering specific money that he believed belonged to him. *See State v. Hicks*, 102 Wn.2d 182, 683 P.2d 186 (1984); *State v. Self*, 42 Wn.App. 654, 713 P.2d 142 (1986).

The trial court would not have given any proposed instruction from McNicholas on good faith claim of title as the only allegations by the State regarding the theft involved deceptive acts of both forging checks and procuring money by promising to do construction work to the victim's house without ever intending on following through with the work. By these deceptive acts, McNicholas could not have been making a good faith claim of ownership to the money he obtained from the victim. This defense was unavailable to him and the trial court would not have instructed the jury on this defense. His attorney was not ineffective for not proposing this instruction to the court. McNicholas' claim of ineffective assistance of counsel fails.

CONCLUSION

McNicholas' claims of insufficient evidence, erroneous admission of ER 404(b) evidence, and ineffective assistance of counsel are not supported by the record. The State presented sufficient evidence to support

every crime charged, the trial court did not abuse its discretion in admitting evidence pursuant to ER 404(b), and he received effective assistance of counsel. The trial court should be affirmed in all respects.

DATED this 22 day of August, 2017.

Respectfully submitted:

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